Supreme Court, U.S.
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No. 98-339

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1997

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GLORIA KELLEY,
*Petitioner,*

v.

KLUGER, PERETZ, KAPLAN & BERLIN, P.A.,
LINDA FIVES, AND HOWARD BERLIN,
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# RESPONDENTS' BRIEF IN OPPOSITION

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September 23, 1998

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## QUESTION PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN REFUSING TO REMAND THIS CASE TO STATE COURT?

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## BASIS OF JURISDICTION IN THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

This case stems from Petitioner's employment with Respondent Kluger, Peretz, Kaplan & Berlin, P.A., a law firm doing business in Florida (R1-1-5). Petitioner worked as a secretary for the Respondent law firm (R1-1-30); was laid off from that employment (R1-1-8); and then instituted the instant action on a pro se basis against three entities: the law firm, one of its partners (Respondent Howard Berlin), and its Office Administrator (Respondent Linda Fives) (R1-1-5 and 6).

Petitioner commenced the instant action on April 2, 1993, by filing suit in state court (i.e., in the Circuit Court of the Eleventh Judicial Circuit, In and For Miami-Dade County, Florida) (R1-1-4 through 24). Petitioner's initial Complaint

consisted of various federal and state law claims, all of which grew out of her termination from the Respondent law firm (R1-1-4 through 24). In the preamble of her initial Complaint, Petitioner alleged that the Respondents denied her a right to earn a living under the pretense of a "layoff" (R1-1-8). In Count I of her initial Complaint, Petitioner alleged that Respondent Fives was responsible for her layoff (R1-1-11).

Count II of the Complaint was captioned "Tort of Retaliatory Discharge." In that count, Petitioner alleged that Respondent Fives effected her dismissal (R1-1-13). Similarly, in Count III of her initial Complaint, Petitioner alleged that Respondent Fives laid her off and that her termination was approved by Respondent Berlin (R1-1-16 and 18). In Count IV of the initial Complaint (which was captioned "Wrongful Termination"), Petitioner likewise alleged that she was terminated under the pretense of a layoff (R1-1-19 and 20).

The final count of the initial Complaint was captioned "Damages" (R1-1-22). That section of the initial Complaint, though captioned a "count," was improperly labeled because it was not a statement of a cause of action (R3-90-20). Instead, "Count V" constituted Petitioner's prayer for relief. In that section of her initial Complaint, Petitioner sought damages for her dismissal from employment (R1-1-22).

In her initial Complaint, Petitioner alleged, under federal law, violations of 42 U.S.C. § 1983 (preamble to Complaint), and violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, et seq. ("Title VII"), as amended by the Civil Rights Act of 1991 (Count III) (R1-1-5, 6, 8, and 18). Under state law, Petitioner alleged breach of duty (Count I), tort of retaliatory discharge (Count II), and wrongful termination (Count IV) (R1-1-9, 13 and 19). As noted above, all of the allegations contained in the initial Complaint dealt with the fact

that Petitioner had allegedly been wrongfully and unfairly terminated by Respondents (R1-1-4 through 24).

Because the initial Complaint included claims brought pursuant to federal law, Respondents (on April 27, 1993) removed the instant action to the United States District Court for the Southern District of Florida (R1-1-1). At the same time, Respondents filed a Motion to Dismiss the initial Complaint in its entirety (R1-2).

On December 3, 1993, the District Court issued an Order (R2-51) on Respondents' Motion to Dismiss. In that Order, the District Court held that Respondents Berlin and Fives could not be sued in their individual capacities under Title VII (R2-51-2 and 3). Accordingly, the District Court dismissed Count III (Petitioner's Title VII count) with prejudice as to Respondents Berlin and Fives (R2-51-3 and 4).

In its Order of December 3, 1993, the District Court also dismissed Count III (Title VII) as to the Respondent law firm

(R2-51-4). That dismissal was, however, without prejudice; and the District Court gave Petitioner fourteen days to file an amended complaint (R2-51-4). In its Order of December 3rd, the District Court also dismissed, with prejudice, Petitioner's claims under 42 U.S.C. § 1983 (R2-51-4). Because the District Court had dismissed both of Petitioner's federal claims, it did not address her state law claims (R2-51-4).

At that point in time, instead of asking the District Court to remand her remaining claims (which were all state law claims), Petitioner again attempted to assert a federal claim under Title VII. On December 9, 1993, Petitioner filed an Amended Complaint in federal court with Count III (Title VII) having been revised (R2-53-6). Petitioner's Amended Complaint also included Count I (Breach of Duty), Count II (Tort of Retaliatory Discharge), Count IV (Wrongful Termination), and Count V (Damages) --- all of which were lifted intact from her initial Complaint (R2-53). On December

17, 1993, Respondents filed a motion to dismiss Petitioner's Amended Complaint in its entirety (R2-54).

On May 12, 1994, the United States Magistrate Judge issued a Report and Recommendation (R3-90) on Respondents' Motion to Dismiss Amended Complaint. In his Report and Recommendation, the Magistrate recommended that Petitioner's Title VII claim (Count III of the Amended Complaint) again be dismissed with prejudice as to Respondents Berlin and Fives (R3-90-6).

In addition to the formal counts contained in her Amended Complaint, Petitioner also alleged that she was bringing the Amended Complaint for an asserted violation of her right to the pursuit of happiness and freedom of speech (R2-53-1 and 3). In his Report and Recommendation, the Magistrate recommended that those claims be dismissed for failure to state a cause of action (R3-90-17 and 20).

On June 7, 1994, the District Court issued an Order adopting the Magistrate's Report and Recommendation in its entirety (R3-106-2). In its June 7th Order, the District Court dismissed the following counts of the Amended Complaint with prejudice: Count I (Breach of Duty), Count II (Tort of Retaliatory Discharge), and Count IV (Wrongful Termination) (R3-106-2). Therefore, the only claim which remained following the District Court's Order of June 7th was Petitioner's Title VII claim (Count III) against the Respondent law firm (R3-106-2).

On December 6, 1996, Respondent Kluger, Peretz, Kaplan & Berlin, P.A., filed a Motion for Summary Judgment on Petitioner's Title VII claim (R5-214). On February 26, 1997, the District Court granted that motion, entering summary final judgment in favor of the Respondent law firm (R6-255).

On March 7, 1997, Petitioner filed a Notice of Appeal with the Eleventh Circuit Court of Appeals (R6-260). On June

9, 1998, the Eleventh Circuit Court of Appeals affirmed the decision of the District Court. Thereafter, Petitioner filed a motion for rehearing en banc which was denied by the Eleventh Circuit Court of Appeals on August 3, 1998. Petitioner filed her Petition for Writ of Certiorari with this Court on August 26, 1998.

The undisputed facts in this case show that Petitioner was hired to work for the Respondent law firm effective May 6, 1991 (R5-214-17 and 39; R6-243-3). Petitioner was hired to work in the Respondent law firm's Bankruptcy Department in its Miami, Florida, office as a legal secretary (R2-53-2; R1-1-30; R5-214-18 through 20; R6-243-3). The head of the Respondent law firm's Bankruptcy Department was Respondent Berlin (R5-214-19; R6-243-3). Respondent Berlin is the individual who hired Petitioner to work at the Respondent law firm (R5-214-21; R6-243-3).

Before Respondent Berlin hired Petitioner, he had known her for a number of years (R5-214-21; R6-243-3). Respondent Berlin knew that Petitioner was Hispanic when he hired her (R5-214-21 through 23). That fact is significant because Petitioner's claim under Title VII was that she was discriminated against based on her Hispanic national origin or race.

While Petitioner worked for the Respondent law firm, its Bankruptcy Department experienced a decrease in business (R5-214-29; R6-243-4). Petitioner was discharged from the law firm in December of 1992 by Respondent Berlin, who was still the head of the Bankruptcy Department (R5-214-21; R6-243-4).

In both her initial Complaint and in her Amended Complaint, Petitioner alleged that she was discharged under the "guise" of a layoff (R2-53-7). Petitioner also asserted that she was replaced by Mary Gaulding (R5-214-25 through 28).

Significantly, Ms. Gaulding is Hispanic (R5-214-25 through 28).

At the time of Petitioner's termination, she was, seniority-wise, the junior clerical person in the Respondent law firm's Bankruptcy Department (R5-214-28). The other clerical employee in the Bankruptcy Department was Betty Bottomley (R5-214-18). Ms. Bottomley had been hired by the Respondent law firm more than two years before Petitioner had been hired (R5-214-38; R6-243-4).

Plaintiff alleged that in lieu of being dismissed, she should have been promoted to the Respondent law firm's Litigation Department to work as a paralegal (R2-53-6). Alternatively, Petitioner alleged that in lieu of being dismissed, she should have been transferred to the Respondent law firm's Litigation Department or its Real Estate Department to work as a legal secretary (R2-53-6). Petitioner asserted that two secretaries in the Litigation Department were hired after she had

been hired; and, therefore, she should not have been released (R1-1-91; R5-214-27). However, the Respondent law firm does not have a practice of transferring legal secretaries from one department to another (R5-214-33). When Petitioner was terminated, there was no vacancy for a secretary in either the Litigation Department or the Real Estate Department (R5-214-41). In fact, the only clerical person hired at the Respondent law firm's office in Miami in the month or two following Petitioner's release was Iliano Palomino, who (like Petitioner) is Hispanic (R5-214-39 and 41).

In February of 1993, the Respondent law firm placed an advertisement for a litigation paralegal to work in its Miami office (R2-53-15; R6-243-4). Maria A. Tucci was hired in March of 1993 to fill that position (R5-214-40 and 42). Significantly, Ms. Tucci is (like Petitioner) Hispanic (R5-214-40 and 42).

Thus, the facts show that the same person (Respondent Berlin) both hired and fired Petitioner; and he knew that Petitioner was Hispanic when he hired her. It is not logical to believe that someone would hire an individual of a particular race or national origin only to terminate that person the next year due to his/her race or national origin. The facts also show that Petitioner was replaced by an Hispanic individual (Ms. Gaulding); that the paralegal position which Petitioner claimed she was qualified for was filled by an Hispanic individual (Ms. Tucci); and that the only clerical person hired in the immediate time frame following Petitioner's dismissal was also an Hispanic individual (Ms. Palomino). Thus, summary final judgment was properly entered in favor of the Respondent law firm by the District Court on Petitioner's Title VII claim.

In her Petition for Writ of Certiorari to this Court, Petitioner did not argue that the District Court erred in ruling against her on her Title VII claim. Instead, Petitioner asserted

that the District Court should have remanded her action to state court. As discussed below, Petitioner's argument is without merit.

## ARGUMENT AND CITATION OF AUTHORITY

### THE CIRCUIT COURT'S AFFIRMANCE OF THE DISTRICT COURT'S REFUSAL TO REMAND THIS CASE DID NOT CREATE A CONFLICT BETWEEN THE CIRCUITS NOR IS IT OF PUBLIC IMPORTANCE. THUS, THE PETITION SHOULD BE DENIED.

Petitioner claimed in her Petition for Writ of Certiorari that there are four reasons why the Court should grant her petition. An examination of those asserted reasons shows that no proper basis exists for the Court to grant the petition. First, Petitioner asserted that her petition must be granted because the Eleventh Circuit Court of Appeals allegedly decided an important question which should be settled by this Court. In its decision in the instant case, the Eleventh Circuit held that

removal in the instant case was proper and that the lower court properly refused to remand the case to state court. The Eleventh Circuit pointed out that under 28 U.S.C. § 1441(a), defendants may remove an action where a federal district court has original jurisdiction. Petitioner, of course, brought the instant action under, inter alia, Title VII. Federal district courts have original jurisdiction over Title VII claims. See 42 U.S.C. § 2000e-5(f)(3). In addition, the Eleventh Circuit pointed out that the lower court has supplemental jurisdiction over Petitioner's state law claims because they were related to her federal claim. See 28 U.S.C. § 1367(a). Accordingly, the Eleventh Circuit held that the Petitioner's argument that the lower court should have remanded the case was without merit.

Petitioner now argues to this Court that the district court erred in not remanding her lawsuit. In support of her argument, Petitioner relies on 28 U.S.C. § 1441(c) and a dissenting

opinion in the Eleventh Circuit's decision in In Re: City of Mobile, 75 F.3d 605 (11th Cir. 1996). 28 U.S.C. § 1441(c) provides as follows:

> Whenever a separate and independent claim or cause of action within jurisdiction conferred by section 1331 of this Title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Petitioner has misread the above-quoted section. By its plain language, that section does not state that a district court must remand all matters in which State law predominates. On the contrary, it states that a district court may determine all the issues or, in its discretion, the district court may remand all matters in which State law predominates. Thus, it is clear that the decision to remand is within the sound discretion of the district court. Even if State law predominates, the district court may determine those issues. Petitioner would rewrite the

statutory section to provide that the district court must remand all matters in which State law predominates.

Moreover, it must be again emphasized that Petitioner brought this action under, inter alia, federal law --- Title VII of the 1964 Civil Rights Act. Petitioner argues that her entire lawsuit should have been remanded, including her Title VII claim, noting that state courts have concurring jurisdiction of Title VII causes of action. However, even though Title VII suits may be brought in state court, that does not mean that state law predominates in a Title VII suit. Instead, it means that a state court could apply federal law to a Title VII case. Petitioner is confusing these concepts by assuming that because a Title VII case may be brought in state court, the federal Title VII claim would then be governed by state law. That is simply not the case.

The fact that the district court, in an exercise of its discretion, determined all issues in Petitioner's lawsuit rather

than remanding her entire lawsuit to state court does not present an issue of public importance for determination by this Court. Congress has already spoken on the issue in enacting 28 U.S.C. § 1441(c). That statute (quoted above) clearly provides that the district court may determine all issues presented in a lawsuit where federal and state claims relating to the same occurrence are combined.

Furthermore, the fact that one judge of the Eleventh Circuit dissented in the In Re: City of Mobile decision, does not create a conflict to be resolved by this Court. Petitioner has not pointed to any conflict between the Circuit Court of Appeals on the issue. Therefore, this Court should deny Petitioner's petition.

Second, Petitioner claims that this Court must grant her petition to cure a supposed conflict between the Eleventh Circuit's decision in the instant case and the decision of the Florida Supreme Court in Scott v. Otis Elevator, 572 So.2d 902

(Fla. 1990). Once again, Petitioner has misread the law. The Florida Supreme Court's decision in Scott does not support Petitioner's assertion that a common law tort of retaliatory discharge or wrongful termination exists in Florida.

As noted by the Florida Supreme Court in its decision in Scott, the Florida Supreme Court held in Smith v. Piezo Technology and Professional Administrators, 427 So.2d 182 (Fla. 1983), that Florida does not recognize a common-law tort of retaliatory discharge. The Florida Supreme Court noted, however, in Smith that Section 440.205, Florida Statutes (1979), created a statutory cause of action for wrongful discharge in a workers' compensation context. The Florida Legislature provided in Section 440.205, Florida Statutes (1979), that an employer could not discharge an employee for filing a claim under the Workers' Compensation Law. The cause of action was, accordingly, statutory. In Scott, the Florida Supreme Court simply determined that damages for emotional

distress are available to a plaintiff who brings suit for wrongful discharge under that anti-retaliation statute. Scott cannot by any stretch of the imagination be read as Petitioner seeks to read it. Scott does not stand for the proposition that a common law cause of action exists in Florida for wrongful discharge. Thus, Petitioner's second basis for her petition should be rejected.

Third, Petitioner asserted that her petition must be granted because the Eleventh Circuit's decision in the instant case allegedly conflicts with relevant decisions of this Court. Petitioner is mistaken. Petitioner asserts that a conflict exists because this Court has held in Yellow Freight Systems, Inc. v. Donnelly, 494 U.S. 820 (1990), and in Taflin v. Levitt, 493 U.S. 455 (1990), that state courts have concurrent jurisdiction over Title VII claims. The fact that state courts have concurrent jurisdiction over such claims does not mean that a conflict exists or that the Eleventh Circuit's decision in the instant case was erroneous. The Eleventh Circuit in its decision in the

instant case never held that state courts lacked concurrent jurisdiction over Title VII claims. Instead, the Eleventh Circuit simply held that the district court did not err in refusing to remand the instant case --- given the fact that Petitioner had brought her lawsuit under both federal and state law. Thus, the fact that state courts can hear Title VII cases does not create any conflict to be resolved by this Court. Accordingly, the third basis for Petitioner's petition provides no proper basis for granting a writ of certiorari.

Fourth, Petitioner alleged that the Eleventh Circuit's decision in this case sanctioned a great departure from the accepted and usual course of judicial proceedings such that this Court must exercise its supervisory power. Petitioner's argument in this regard is merely a restatement of her position that the district court erred in not remanding the instant case; and that the Eleventh Circuit, therefore, erred in affirming the

decision of the lower court. However, as pointed out above, the district court did not err in refusing to remand the instant action to state court. Therefore, Petitioner's fourth argument is without merit.

## CONCLUSION

Respondents properly removed the instant action to federal court because Petitioner brought this action under, inter alia, federal law. Petitioner's entire lawsuit dealt with the fact that she had been discharged by the Respondents. Under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1367(a), the district court clearly had jurisdiction over Petitioner's entire lawsuit. The fact that the district court did not remand the instant case does not raise an issue of public importance, nor do the decisions of

the district court and the Eleventh Circuit create a conflict to be resolved by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

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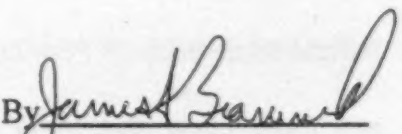
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of this document has been furnished to Ms. Gloria Kelley, Petitioner, 10564 S.W. 112th Avenue, Miami, Florida 33176, by mail, this 23rd day of September, 1998

James S. Bramnick